Lisa Knox (SBN: 279406)
CALIFORNIA COLLABORATIVE FOR IMMIGRANT JUSTICE
1999 Harrison St #1800
Oakland, CA 94612
Telephone: (510) 230-2746
Facsimile: (415) 840-0046
lisa@ccijustice.org

Oren Nissim Nimni*
Amaris Montes*
Sophie Angelis (SBN 341668)
RIGHTS BEHIND BARS
416 Florida Ave. NW #26152
Washington, D.C. 20001
Telephone: (202) 540-0029
oren@rightsbehindbars.org

Trevor Kosmo (SBN 329218)
CENTRO LEGAL DE LA RAZA
3400 East 12th Street
Oakland, CA 94601
Telephone: (510) 838-0265
Facsimile: (510) 437-9164
tkosmo@centrolegal.org

Counsel for Plaintiff Sylvia Ahn

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SYLVIA AHN,

Plaintiff,

v.

GEO GROUP, INC., et al.,

Defendants.

Case No. 1:22-cv-00586-JLT-BAK (SAB)

PLAINTIFF'S OPPOSITION TO DEFENDANT UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AND THE UNITED STATES OF AMERICA'S MOTION TO DISMISS

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INTRODUCTION

In February 2020, ICE took Choung Woong Ahn ("Mr. Ahn") into its custody and detained him at Mesa Verde Detention Facility ("Mesa Verde"), pending removal proceedings.

Mesa Verde is not a safe place, even at the best of times: ICE operates the facility through GEO Group, a private company with a track-record of incompetence which ICE is aware of and allows. And in March 2020, when the COVID-19 pandemic hit California, conditions at Mesa Verde got even worse. ICE and GEO Group failed to implement even the most basic safety precautions at the facility, exposing detainees to such substantial risks of harm that federal courts declared the conditions unconstitutional and placed Mesa Verde under a series of injunctive orders.

Still, ICE continued to detain Mr. Ahn there, despite the dangerous conditions, and despite the fact that he was 74 years old, had several comorbidities, suffered from serious mental illness, and had a history of multiple suicide attempts. Mr. Ahn's mental health deteriorated while he was detained at Mesa Verde—a fact that was known to GEO Group and ICE. ICE still took no steps to protect Mr. Ahn from harm. On May 17, 2020, Mesa Verde staff left Mr. Ahn unobserved in an isolation cell with a tie off point. Predictably, and tragically, Mr. Ahn died by suicide.

Sylvia Ahn ("Plaintiff"), Mr. Ahn's daughter, brought this action on behalf of his estate. She brings claims against the United States ("Defendant") under the Federal Tort Claims Act ("FTCA") because ICE's negligent acts and omissions caused her father's death.

Defendant filed a motion to dismiss her complaint on two bases. (1) Defendant raises a factual challenge to this Court's jurisdiction, arguing that Plaintiff's claims fall within the FTCA's exceptions for a) independent contractors and b) discretionary functions. But the evidence that Defendant relies upon is highly

selective, and this Court should not resolve a jurisdictional challenge on such incomplete facts. Defendant, moreover, has not met its burden of proving that either exception applies. The alleged conduct a) is directly attributable to ICE, was legally negligent, and breached nondelegable duties to Mr. Ahn; and b) was unconstitutional and contrary to mandatory safety standards and protocols.

(2) Defendant also argues that Plaintiff fails to state a claim for false imprisonment because ICE had authority, and in fact was required, to detain Mr. Ahn. But ICE always has the authority not to remove detainees and therefore to not detain pending removal, and has in practice released detainees who it believes are subject to "mandatory" detention. Further, even if detaining Mr. Ahn was actually required by statute, ICE does not have the authority to violate the Constitution in service of enforcing legislation.

Because Plaintiff has stated claims for relief against Defendant, and because this Court has jurisdiction over those claims, Defendant's motion to dismiss should be denied, and Plaintiff's case should be allowed to proceed.

BACKGROUND

A. Criminal conviction and detention by ICE

Mr. Ahn was admitted to the United States as legal permanent resident in 1988. Second Amended Complaint ("SAC") ¶ 13. He lived in the San Francisco Bay Area until 2013, when he was convicted of a felony and sentenced to 10 years in state prison. SAC ¶ 3; Defendant's Motion to Dismiss ("Mot. Dismiss") at 2. Because the felony is a removable offense, ICE placed a detainer on Mr. Ahn so that the agency would be notified upon his release. Mot. Dismiss at 2.

While Mr. Ahn was serving his prison sentence, he developed severe depression and other mental health conditions, and attempted suicide three times, in 2014, 2015, and 2019. SAC ¶ 14. Mr. Ahn also had numerous physical disabilities, including hypertension, type 2 diabetes, and severe heart-related issues. *See* Ex. 1,

Request to the California Attorney General for Investigation into the Death of Mr. Ahn ("Request to AG") at 5–6.

Mr. Ahn was granted parole about 7 years into his sentence, while in custody at California State Prison ("CSP") Solano. SAC ¶ 15. On January 9, 2020, CSP Solano notified ICE, pursuant to the detainer, that Mr. Ahn would shortly be released. Mot. Dismiss at 2. ICE then commenced removal proceedings against Mr. Ahn and issued a warrant for his arrest. *Id*. On February 21, 2020, CSP Solano released Mr. Ahn on parole, and ICE Enforcement and Removal Operations ("ERO") immediately took him into its custody. *Id.*; SAC ¶ 15. ERO transported Mr. Ahn to Mesa Verde for detention pending his removal proceedings. Mot. Dismiss at 2; SAC ¶ 15.

At the time, Mr. Ahn was 74 years old. SAC ¶ 12.

B. Conditions at Mesa Verde

Mesa Verde is operated by a private company, GEO Group, which ICE contracted in 2015. *Id.* ¶ 15–16. Conditions in immigration detention facilities like Mesa Verde are governed by ICE's Performance-Based National Detention Standards. *See* Ex. 2, Performance Based National Detention Standards ("PBNDS") at i. The PBNDS require, among other things, that detainees be screened at intake for disabilities and history of mental illness or self-harm. Ex. 2, PBNDS at 333; *see also* SAC ¶ 69. "At the time of screening, staff should also assess relevant available documentation as to whether the detainee has been a suicide risk in the past, including during any periods of detention or incarceration." Ex. 2, PBNDS at 333.

Mr. Ahn's intake screening failed to identify his history of depression, history of suicide attempts, or other mental health conditions. SAC ¶ 26.

Conditions at Mesa Verde did not help his prognosis, to say the least. In March 2020, Mr. Ahn was admitted to the emergency department of an outside hospital for an emergency surgery to remove a mass on his lung. *Id.* ¶ 28. Mr. Ahn, believing he

had been diagnosed with lung cancer, was distressed; ICE delayed authorizing his follow-up care or biopsy, and Mr. Ahn received neither before he died. *Id.* ¶¶ 29–31.

Also in March, the COVID-19 pandemic hit California. Mr. Ahn, at 74 years old and with numerous comorbidities, was at risk of serious illness or death if he contracted the virus. Ex. 1, Request to AG at 6. And as a detainee, his likelihood of contracting the virus was great: the CDC warned from the outset of the pandemic that congregate settings, like immigration detention centers, created a high risk for transmission. SAC ¶ 32.

At Mesa Verde, the situation was particularly dire. On April 10, 2020, ICE issued COVID-19 Pandemic Response Requirements, a guidance document developed in consultation with the Centers for Disease Control and Prevention. Ex. 3, *COVID-19 Pandemic Response Requirements* ("PRR") at 4. The PRR are mandatory requirements that applied to all facilities holding ICE detainees. Those requirements included, *inter alia,* that each facility was to "have a COVID-19 mitigation plan," *id.* at 6; comply with CDC guidance, *id.* at 9; and identify any detainee who was at-risk, including detainees who are "65 and over," and who have "mental health conditions . . . including depression," *id.* at 10. Any detainee who was "determined to require health care beyond facility resources" was to "be transferred in a timely manner to an appropriate facility." *Id*. A facility that reached a "community risk status" of level "red" was also required to "implement[] population reduction strategies to reduce detainee population to appropriate levels for physical distancing." *Id.* at 17–18.

At Mesa Verde, however, ICE and GEO Group failed to implement even these most basic protections. On April 20, 2020, detainees at Mesa Verde and another detention facility filed a class habeas petition and a class complaint for injunctive relief, alleging that conditions were so dangerous that they violated constitutional

standards. On April 29, 2020, Judge Chhabria granted the temporary restraining order ("TRO"), finding that:

> People were still sleeping in barracks-style dorms within arm's reach of one another. Only two detainees had been tested for Covid-19, despite the well-known "tinderbox" risk of jail epidemics. It appeared that ICE had not even made the effort to determine which of its detainees suffer from medical conditions that put them in particularly severe danger from the virus.

Zepeda Rivas v. Jennings, 465 F. Supp. 3d 1028, 1030 (N.D. Cal. 2020). The court later noted that ICE's conduct indicated that "the safety of the people at these facilities" did not rank highly on "ICE's list of priorities." *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36, 40 (N.D. Cal. 2020).

Inside Mesa Verde, Mr. Ahn's mental health deteriorated. He knew that he was at risk if he contracted the virus, and also knew that his odds of getting it at Mesa Verde were high. Ex. 1, Request to AG at 6–7. On April 10, Mr. Ahn participated in a peaceful hunger strike to protest the conditions at Mesa Verde. SAC ¶ 35. That same month, he reported to a psychologist that he had feelings of sadness, low energy, and trouble sleeping. *Id.* ¶ 36. The psychologist diagnosed him with unspecified depressive disorder and referred him to a psychiatrist. *Id*. He subsequently told medical staff that he had attempted suicide three times, *id.* ¶ 37, and expressed feelings of not "want[ing] to live in this life," *id.* ¶ 38. Mr. Ahn continued to become more distressed and despondent because of the conditions inside Mesa Verde, in particular the facility's now well-documented and dangerous mishandling of the COVID-19 pandemic. *Id.* ¶ 39.

Mr. Ahn, through his lawyers, submitted multiple requests to ICE to release him from custody, all of which ICE denied. *Id.* ¶ 40. On April 15, 2020, he filed a habeas petition, challenging his detention as unreasonably dangerous in light of the pandemic, and therefore punitive in violation of the Fifth Amendment. *Ahn v. Barr*, No. 20-CV-02604 (Apr. 20, 2021), Dkt. 1. On April 16, he filed for a TRO seeking

his release. *Id.*, Dkt. 7. And on April 20, 2020, ICE filed an opposition, attaching in support a sworn declaration from Alexandar Pham, the Assistant Field Office Director of the San Francisco Field Office of ICE ERO. *Id.*, Dkt. 15. Mr. Pham's declaration represented that ICE was taking precautions against the virus at Mesa Verde, including, among other things, that all detainees were quarantined for 14 days at Mesa Verde before being placed in general population. *Id.*, Dkt. 15-2 ¶¶ 10–11. Mr. Pham's statements were false.[1] But the court apparently credited them, noting, for example, that a declaration by one of Mr. Ahn's lawyers "about the conditions at Mesa Verde, which was based on an 'in person visit to Mesa Verde that occurred on Friday March 13, 2020 . . . undoubtedly does not reflect prevailing conditions when the declaration was filed almost a month after the visit." *Id.*, Dkt. 20 at 5. The court concluded that Mr. Ahn had not met his burden of showing that that conditions at

[1] Mr. Pham submitted sworn statements containing essentially similar representations in the *Zepeda Rivas* litigation. And in June 2020, Judge Chhabria found that Mr. Pham (and other key ICE and GEO Group officials in charge of Mr. Ahn's detention at Mesa Verde) "gave false testimony several times in these court proceedings, on matters of importance." *Zepeda Rivas*, 504 F. Supp. 3d 1060, 1064 (N.D. Cal. 2020). Specifically, the court found that:

> although Pham submitted a declaration stating that new intakes arriving from facilities with confirmed cases of Covid-19 were quarantining for 14 days before being housed with the general population, no such quarantining was occurring. In fact, the defendants were placing all new intakes into the general population dorms after nothing more than a general symptoms screening, without isolating or quarantining them for any amount of time.

Id. at 1067; *see also id.* at 1065 (listing ICE's "submission of a declaration from Assistant Field Office Director Alexander Pham falsely stating that Mesa Verde was imposing a 14-day quarantine on all new arrivals from facilities with reported cases of Covid-19 when no such quarantine existed" as evidence of constitutional deliberate indifference). Judge Chhabria concluded: "These false statements made under oath . . . [including] the false declaration from Pham about how Mesa Verde was handling incoming detainees, further underscore that the defendants cannot be trusted to conduct themselves responsibly as it relates to the safety of the detainees." *Id.* at 1066.

Mesa Verde were unconstitutionally dangerous, and denied his application for a TRO on May 4, 2020. *Id.*

C. Suicide

At Mesa Verde, Mr. Ahn's mental health continued to deteriorate. On May 11, 2020, after learning that his latest release request was denied, Mr. Ahn cried and became abnormally quiet. SAC ¶ 41. On May 12, 2020, he was admitted to an outside hospital, Mercy Hospital in Bakersfield, after struggling to breathe, complaining of chest pain, and having liquid coming out of his nose. *Id.* ¶¶ 42–45.

Mr. Ahn was discharged from Mercy Hospital on May 14, 2020 and returned to Mesa Verde. *Id.* ¶ 46. At this point, Mr. Ahn's depression diagnosis and history of suicidality were well-documented and known or should have been known to GEO Group and ICE. But upon his return to Mesa Verde on May 14, Mr. Ahn was placed in an isolation cell with a tie-off point. *Id.* ¶ 48. His isolation was ostensibly for purposes of medical quarantine, though at the time, ICE and GEO Group were routinely accepting transfers of detainees to Mesa Verde from California prisons and placing them directly into general population without quarantining or even testing them. *Id.* ¶¶ 46–47, 52; *Zepeda Rivas v. Jennings*, No. 20-cv-02731-VC, 2020 WL 4554646, at *1 (N.D. Cal. Aug. 6, 2020).

It is a well-known fact, and was at the time, that solitary confinement puts a person at risk of harm, especially if that person has serious, pre-existing mental illnesses. SAC ¶ 50. Predictably, once in isolation, Mr. Ahn began experiencing suicidal ideation, which he expressed to his brother. *Id.* ¶ 56. Mr. Ahn also told a psychologist that he had feelings of depression. *Id.* ¶ 54. On May 16, 2020, a clinical psychologist evaluated Mr. Ahn and reported that he was at "high suicidal risk if deported." *Id.* ¶ 57. On the morning of May 17, 2020, an attorney for Mr. Ahn emailed ICE, requesting that the agency return him to his dormitory because isolation was proving detrimental to Mr. Ahn's mental health. *Id.* ¶ 58. Also on May

17, a contracted medical provider indicated that Mr. Ahn's mental illness was "severe" and again stated that Mr. Ahn was at "high risk of suicide if deported." *Id.* ¶ 59. Deportation was likely and imminent: Mr. Ahn's next scheduled hearing in his removal proceedings was in two days, on May 19, 2020. *Id.* ¶ 60. He remained uncounseled in his removal proceedings, and had not prepared or filed any applications for relief that would allow him to remain in the United States. *Id.*; Ex. 1, Request to AG at 10.

The PBNDS contain requirements and protocols for accommodating detainees with disabilities, and responding to detainees at risk of significant self-harm or suicide. The PBNDS require ICE and GEO Group to "act affirmatively to prevent disability discrimination." Ex. 2, PBNDS at 344. "[I]t is incumbent upon facility staff to identify detainees with impairments that are open, obvious, and apparent," through, e.g., "medical or intake screenings, or through direct observation." *Id.* at 348. If a detainee with a "potential disability" is identified, "the facility shall review the need for any necessary accommodations," and provide those accommodations "in an expeditious manner." *Id.* at 348–49. Reasonable accommodations include, *inter alia*, "proper medication and medical treatment," and "appropriate housing." *Id.* at 347–48.

The PBNDS also include requirements and protocols for preventing self-harm and suicide. Under the PBNDS, detainees may be identified as being at risk for self-harm or suicide at the initial intake screening, discussed *supra*, "or at any time while in ICE custody." *Id.* at 333. "Staff must therefore remain vigilant in recognizing and appropriately reporting when a risk is identified." *Id.*

Once a detainee is identified as "at-risk" of suicide or self-harm, staff must refer the detainee for an evaluation by a mental health provider within 24 hours. *Id.* at 333–34. In between the identification and evaluation, security staff must place the detainee in a secure environment on a constant one-to-one visual observation. *Id.* If

a suicidal detainee is placed in "an isolated confinement setting," the detainee must "receive continuous one-to-one monitoring, welfare checks at least every 8 hours conducted by clinical staff, and daily mental health treatment by a qualified clinician." *Id*. at 334. "The isolation room must be suicide resistant, which requires that it be free of objects and structural elements that could facilitate a suicide attempt." *Id*. "Security staff shall ensure that the room is inspected prior to the detainee's placement so that there are no objects that pose a threat to the detainee's safety." *Id*. "Any detainee who is believed to be in need of seclusion, and/or restraint due to self-harming or suicidal behavior should be transferred to a psychiatric facility, if deemed medically necessary to appropriately treat the needs of the detainee." *Id*. at 336.

But GEO Group and ICE left Mr. Ahn in his isolation cell. On the evening of May 17, 2020, Mr. Ahn was left unobserved in his isolation cell for a period of at least 18 minutes. SAC ¶¶ 61–62; Ex. 1, Request to AG at 10. During this period, he died by hanging himself with a bedsheet. SAC ¶ 62.

D. ICE's relationship with GEO Group

Both ICE and GEO Group bear responsibility for Mr. Ahn's death. GEO Group is a private, for-profit company that operates prisons and immigration detention centers. Its facilities are known for inadequate medical care, understaffing, violence, and other issues. *Id*. ¶ 19. In 2012 alone, two detainees died while in custody at GEO Group-operated detention facilities because they received inadequate medical care. *Id*. That same year, the Department of Justice identified "systemic egregious practices," including inadequate medical care, at a GEO Group-operated prison in Missouri. *Id*.

Nonetheless, ICE awarded a contract to GEO Group in 2015 to operate Mesa Verde. *Id*. ¶ 18. Predictably, GEO Group performed dismally—a fact of which ICE was well-aware. In 2016, a report was published indicating that GEO Group went

"to great lengths to hide information about their medical staffing" at Mesa Verde, and that there were "frequent and long-term vacancies for contractually-required positions, creating a dangerous administrative limbo which allows facilities to pass inspection while also saving money on personnel costs." *Id.* ¶ 20. A 2018 investigation by an inspector general of the nearby Adelanto Detention Center, also operated by GEO Group, found nooses hung in cells. *Id.* Numerous lawsuits alleged problems at GEO Group-operated facilities, including with medical care. *See e.g.*, *Martinez v. Geo Grp., Inc.*, No. EDCV 18-1125-R, 2019 WL 3758026, at *3 (C.D. Cal. Apr. 30, 2019); *Carpio v. Chief Couns.*, DHS-ICE, No. EDCV172030DDPAGR, 2018 WL 5919474, at *1 (C.D. Cal. Aug. 8, 2018), *report and recommendation adopted*, No. EDCV172030DDPAGR, 2019 WL 1670940 (C.D. Cal. Apr. 16, 2019).

Nonetheless, in 2019, ICE renewed its contract with GEO Group to operate Mesa Verde. SAC ¶ 21.

The PBNDS apply to Mesa Verde, both by their own terms and through ICE's contract with GEO Group. *See* Ex. 2, PBNDS at 344 (stating that the detention standard for, e.g., accommodating disabled detainees applies to "Contract Detention Facilities"); *see also* Mot. Dismiss, Ex. 2-A at 2. The PBNDS state that, "[b]ecause ICE exercises significant authority when it detains people, ICE must do so . . . with a focus on providing sound conditions and care." Ex. 2, PBNDS at i.

To ensure that it is detaining people in conditions that comply with the PBNDS, ICE had the authority to conduct inspections of Mesa Verde and ensure compliance. SAC ¶ 22. Prior to the pandemic, ICE's inspections were perfunctory, and checked only GEO Group's policies rather than its actual practices. *Id.* GEO Group was anyways notified of inspections in advance, giving it an opportunity to cover up or obscure issues at its facilities and so pass inspection without having to fix problems. *Id.* ICE had reason to know about this problem with its inspection

practices at Mesa Verde in particular since at least 2016. *Id*. ¶ 20. But it did not change those practices, and the perfunctory supervision continued. Indeed, three inspections in 2016 and 2017 concluded that GEO Group met all standards at Mesa Verde related to suicide prevention and intervention—a conclusion belied by Mr. Ahn's tragic and preventable death. *Id.* ¶ 24.

ICE's inspections were no less perfunctory during the pandemic. ICE has represented that it was conducting frequent inspections of Mesa Verde to ensure that the facility was in compliance with the PBNDS and PRR. *Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC (Apr. 20, 2020), Dkt. 31-1 ¶ 14, Decl. Erik Bonnar.[2] But despite the facility's blatant failures to be in compliance with regulations, those inspections either failed to notice, or failed to correct, many of the violations that put immigrant detainees in danger. *See Zepeda Rivas*, 465 F. Supp. 3d at 1030.

LEGAL STANDARD

1. Federal Rule of Civil Procedure 12(b)(1).

Whether the United States has waived its sovereign immunity under the FTCA is an issue of subject matter jurisdiction and may be challenged under Federal Rule of Civil Procedure 12(b)(1). *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). A Rule 12(b)(1) challenge may be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a factual challenge, a defendant

[2] In a declaration submitted to the court, Erik Bonnar swore: "ERO management staff, including myself, hold several meetings every week and are in constant communication twenty-four hours a day, seven days a week over MVDF and issues stemming from COVID-19. Additionally, ICE staff is in daily contact with the Facility Administrator and his staff, including medical, at MVDF over the health and safety of detainees. Given the ICE protocols, MVDF staff and ICE officers are taking appropriate measures to ensure the health and safety of detainees and will continue to do so. ICE is on-site daily and can address any issues, as presented or directed, to ensure the ICE protocols are in place and to report back any issues they may observe that need to be addressed."

presents extrinsic evidence to demonstrate that the complaint lacks jurisdiction based on the facts of the case. *Id*. "Jurisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action." *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139 (9th Cir. 1983) (cleaned up and internal quotations omitted).

Defendant is correct that a plaintiff usually bears the burden of establishing jurisdiction. *See* Mot. Dismiss at 6. But the burden for prevailing on a 12(b)(1) motion operates differently when jurisdiction is based on the FTCA. An FTCA plaintiff "bears the burden of persuading the court that it has subject matter jurisdiction under the FTCA's general waiver of immunity." *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992). But it is the *defendant* who bears the burden of proving that one of the exceptions is applicable. *Id*. at 702 (explaining that the burden is appropriately placed on the defendant because "an exception to the FTCA's general waiver of immunity, although jurisdictional on its face, is analogous to an affirmative defense").

2. Federal Rule of Civil Procedure 12(b)(6).

"A complaint may be dismissed for failure to state a claim only when it fails to state a cognizable legal theory or fails to allege sufficient factual support for its legal theories." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016). In reviewing a complaint, courts "must accept all well-pleaded material facts as true and draw all reasonable inferences in favor of the plaintiff." *Id*. Rule 12(b)(6) is read in conjunction with Federal Rule of Civil Procedure 8(a)(2), which requires that a complaint contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[D]etailed factual allegations" are not required. *Id*.

ARGUMENT

Defendant argues that this Court should dismiss Plaintiff's claims for two reasons.

1) Defendant raises a factual challenge to this Court's jurisdiction, arguing that Plaintiff's claims fall within the FTCA's exceptions for conduct of independent contractors and conduct related to discretionary functions. But a) the facts that Defendant introduces and relies upon—in particular, the contract between ICE and GEO Group—are far from complete, and this Court should not resolve a jurisdictional challenge on such selective evidence. In addition, Defendant has not met its burden of proving that either exception to the FTCA's general waiver of immunity applies. b) Plaintiff alleges legally negligent conduct that is directly attributable to ICE, not GEO Group, and so does not fall into the independent contractor exception. That conduct also breached nondelegable duties that ICE, as a jailer, owed Mr. Ahn. c) In addition, none of ICE's alleged negligent conduct was discretionary. The alleged conduct was unconstitutional, because it violated Mr. Ahn's Fifth Amendment rights; contravened mandatory standards about immigration detention conditions and pandemic-related safety; and also dealt with safety protocols, which are not susceptible to policy analysis.

2) Defendant also argues that Plaintiff fails to state a claim for false imprisonment, because ICE had authority, and in fact was required, to detain Mr. Ahn. But ICE does not have authority to detain Mr. Ahn in unconstitutional conditions, and anyways, detention was not mandatory and ICE regularly released detainees like Mr. Ahn, especially during the pandemic.[3]

[3] Defendant raises several arguments that Plaintiff does not oppose. Specifically, Plaintiff does not oppose Defendant's arguments that the United States is the sole proper federal Defendant to this suit and that ICE may be dismissed, *see* Mot. Dismiss at 7–8, or that Plaintiff cannot state an IIED claim against the United States,

I. This Court has Jurisdiction over Plaintiff's Claims.

1. The United States improperly cites only part of its contract with GEO Group.

First, the arguments Defendant makes in its motion to dismiss rely almost exclusively on the contract signed between ICE and GEO Group. Defendant contends that the contract supports its two main arguments—that the independent contractor exception exempts it from liability and that ICE's decisions were made with discretion under the contract—and is cited on virtually page of the motion. Although Rule 12 motions filed before discovery typically would not permit for the attachment of evidence, Defendant may do so here because it challenges this court's jurisdiction under Rule 12(b)(1). *See, e.g.*, *Safe Air*, 373 F.3d at 1039.

The attached contract, however, is incomplete. Page 3 of the document details *twenty-eight* attachments "incorporated into this Contract." Mot. Dismiss, Ex. 3 at 9. Just one of these attachments, "ICE Design Standards for CDF," is a document over four hundred pages long. A number of other attachments are not publicly available and therefore neither Plaintiff nor the Court has access to them. In short, Defendant seeks dismissal on the basis of a contract of which it has provided only a small portion.

These omissions are neither harmless nor neutral. The attached documents, inasmuch as Plaintiff knows what they contain to summarize them here, detail both various ways that ICE supervises GEO Group, undermining the independent contractor exception, and various ways ICE binds itself to act, undermining the discretionary function exception. *See, e.g.*, *id.* (listing as attachments an ICE health

see Mot. Dismiss at 23–24. Plaintiff also agrees that she can only seek a jury trial, attorneys' fees, and punitive damages from GEO Group. *See* Mot. Dismiss at 24.

services intake screening form and health design standards). Defendant quotes at length portions of the contract that supports its arguments, *see, e.g.*, Mot. Dismiss at 9, but then omits the attachments that undermine them.

Evidence and procedural law specifically prohibit this kind of gamesmanship. Federal Rule of Evidence 106 requires that "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part . . . that in fairness ought to be considered at the same time." Federal Rule of Civil Procedure 32(a)(6) mandates that if "a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts."

The situation here—created by the less common introduction of record evidence before discovery—is far worse. Neither this Court nor Plaintiff know what the rest of the contract contains. Defendant cannot seek dismissal of Plaintiff's claim relying on the parts of the contract it believes support its argument without even providing the parts of the contract that do not. The motion should be denied in its entirety for this reason alone.[4]

2. <u>The independent contractor exception does not apply.</u>

Second, the Defendant's motion should be denied because it has not proven that the independent contractor exception to the FTCA applies. Specifically, Defendant argues that: the alleged negligent conduct, because it involves a contractor, falls within the independent contractor exception; Plaintiff's theories of liability based on negligence are unsound; and ICE did not have nondelegable duties to Mr. Ahn, because it was not the owner of Mesa Verde. Each of these arguments

[4] This is particularly true where, as noted above, ICE has misled the courts about their activities at this same facility in recent, prior litigation.

is incorrect or not established by evidence, and the independent contractor exception does not bar Plaintiff's complaint.

a. The independent contractor exception does not bar all claims of negligence involving a federal agency and its contractor.

Defendant argues that "even if plaintiff's assertions of independent failings by ICE were true, they do not countermand the independent contractor exception." Mot. Dismiss at 14; *see also id.* at 9 (subheading this section of its motion to dismiss "Plaintiff's allegations of negligent acts or omissions by ICE do not undermine the independent contractor exception."). This is incorrect: the independent contractor exception only protects the United States from vicarious liability based on the wrongdoing of its contractors. *Edison v. United States*, 822 F.3d 510, 518 (9th Cir. 2016) ("Courts have construed the independent contractor exception to protect the United States from vicarious liability for the negligent acts of its independent contractors."). Here, Plaintiff has alleged negligent conduct on behalf of ICE itself related to its decision to hire, retain, and fail to supervise an obviously incompetent contractor, and also to not take reasonable steps (including implementing its own safety protocols) to protect detainees. These categories of conduct do not fall into the independent contractor exception.

b. Plaintiff's theories of liability are sound.

Defendant also disputes four elements of Plaintiff's theories of liability. First, it argues that ICE could not have been negligent in detaining Mr. Ahn during a global pandemic because it was required to do so by statute. Mot. Dismiss at 10. This is not true. Despite the misnomer of "mandatory detention," the U.S. Supreme Court has made clear that the United States *always* has the discretion to not remove, and therefore to not detain pending removal. *See Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1983 n.28 (2020) ("the Executive always has discretion not to remove"). And ICE has long used this discretion: during the

pandemic specifically, "[e]ven individuals required to be detained by statute can be and were released pursuant to ICE guidelines and policies, and statutory and regulatory provisions." *Fraihat v. U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709, 726 (C.D. Cal. 2020). ICE's Acting Assistant Field Officer Director's sworn statement that "ICE could only release [Mr. Ahn] in the limited circumstances identified in Section 1226I(2)" is inconsistent with this plain reality. ICE could have released Mr. Ahn: it simply chose not to. The Ninth Circuit has made clear that 1226(c)'s mandate is not absolute and cannot override "consideration of the risk of severe illness or death [of a detainee]." *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 633 (9th Cir. 2021). Finally, even if the detention of Mr. Ahn actually was mandated by statute, ICE would still not have the authority to violate the Constitution in doing so, as the executive branch may not violate the Constitution in service of enforcing legislation. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Likewise, and *contra* to Defendant's argument, this Court has jurisdiction to review the legality of Mr. Ahn's detention. *See, e.g.*, Mot. Dismiss at 15–16. The Supreme Court has explicitly recognized immigration decisions by the executive branch do not escape judicial review if the decision runs afoul of "important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). The judicial review of immigration policies also extends to "foreign policy arguments that are offered to justify legislative or executive action when constitutional rights are at stake." *American–Arab Anti–Discrimination Comm. v. Reno*, 70 F.3d 1045, 1056 (9th Cir. 1995). Because Mr. Ahn's conditions of confinement were unconstitutional, as discussed in detail *infra*, ICE did not have the authority, let alone obligation, to detain him, and this Court may review the constitutionality of ICE's actions. Of course, once into discovery, Defendant will have the opportunity to gather evidence on why ICE's actions were reasonable, but it is not entitled to dismissal on this ground.

Second, Defendant argues that it cannot be liable under a theory of negligent selection because GEO Group's negligent actions were an intervening cause. Mot. Dismiss at 10. To be sure, GEO Group has also violated the law, but this argument proves far too much, as it would eliminate negligent retention and negligent supervision claims entirely as such claims always involve harmful actions by the contractor downstream of negligence in retention or selection. *See, e.g.*, *L. B. Foster Co. v. Hurnblad*, 418 F.2d 727 (9th Cir. 1969) (example of tort defendant liable for negligently retaining an incompetent contractor). Nor does Defendant's authority, exclusively out-of-circuit, support this argument. Despite Defendant's representation otherwise, *Perkins v. United States* did not involve or even mention the independent contractor exception. 55 F.3d 910, 917 (4th Cir. 1995) Instead, the case involved a suit against federal employees whose conduct—assessing and collecting taxes—the FTCA expressly excepted from its waiver of sovereign immunity. *Id.* When the plaintiff attempted to amend her complaint to bring a claim of negligent supervision against the supervisor of the federal employee, the Fourth Circuit naturally explained that the plaintiff could not skirt the FTCA's express exception by bringing the claim against a supervisor, as "the negligent supervision claim depends on activity of the supervised agent which is itself immune." *Id.* at 916. *Perkins* does not bear on the question here, which involves the supervision and retention, not of lower-level federal employees whose conduct is subject to an express FTCA exception, but instead independent contractors.

Third, Defendant argues that ICE had no duty to supervise because it delegated all relevant decision-making to GEO Group. Mot. Dismiss at 11. There are three independent problems with this argument as a basis of dismissal. First, its invocation of authority is misleading. Defendant writes that "for negligent supervision to override the independent contractor exception, an agency must 'affirmatively undertake[] a duty to supervise in the first place.'" Mot. Dismiss at 11

(quoting *Chaffin v. United States*, 176 F.3d 1208, 1212 (9th Cir. 1999)). But *Chaffin* does not explain general principles of the FTCA—instead it explains specific principles of the Alaska tort law that dictated the outcome in that particular case. Indeed, the sentence Defendant quotes begins, "In Alaska," and ends with a citation to the Alaska Supreme Court. 176 F.3d at 1212. Defendant does not explain what California law has to say on this subject and how it dictates dismissal and therefore has not met its burden of showing that this exception applies.

California tort law, in fact, explicitly *permits* hirers to be liable for the failures of their independent contractors—specifically, in circumstances where a hirer retains control over the contractor and exercises that control in a way that contributes to the plaintiff's injury. *See, e.g.*, *Hodges v. Hertz Corp*., 351 F. Supp. 3d 1227, 1239 (N.D. Cal. 2018). The relevant issues under California law—about ICE's degree of control, and the causal link between that control and Mr. Ahn's death—are fact-bound ones, and so are best evaluated after discovery and not on a motion to dismiss. Defendant, at any rate, has not submitted enough evidence to resolve these issues at the motion to dismiss stage. For one, the information that Defendant includes with its motion demonstrates a level of control far greater than the precedent it cites in cases like *Chaffin*. *Chaffin* involved a radar site in remote Alaska that was contracted to a private provider but that the government "infrequent[ly]" inspect[ed]." *Id.* at 1212. The contract attached to Defendant's complaint, by contrast, incorporates 28 separate attachments of government regulation dictating how GEO Group must operate Mesa Verde pursuant to the contract. Mot. Dismiss, Ex. 3 at 9. These include, for example, ICE Health Service Corps (IHSC) Minimum Staffing Requirements Standards, IHSC electronic Quality Medical Care Audit tool, and ICE design standards, the latter of which is a 433-page document of requirements bound into the Mesa Verde contract. *Id.* These requirements undermine Defendant's argument that, as a matter of law, all "operations and decisionmaking" was done by GEO Group.

For another, Defendant's evidence is incomplete and unreliable. Defendant attaches parts of its then-operative contract with GEO Group as evidence in support of its position, but, as described *supra*, the contract is incomplete. Defendant also attaches declarations from a staff member, stating that the agency does not "manage," "supervise," or have any "involvement in or authority over … day-to-day operations." Mot. Dismiss, Ex. 3 at 3. "ICE has no responsibilities," she writes, concerning "medical and health services." *Id.* GEO Group "alone decide[s] how to best ensure that detainees receive all necessary and proper medical treatments and interventions." *Id.* This description is entirely inconsistent from the one that ICE provided in COVID-19 litigation against Mesa Verde. In sworn declarations, ICE officials attested in that litigation that "the GEO medical staff on-site [] is overseen by the ICE Health Services Corps," and continued:

> ICE staff is in daily contact with [GEO Group staff] including medical, at MVDF over the health and safety of detainees. Given the ICE protocols, MVDF staff and ICE officers are taking appropriate measures to ensure the health and safety of detainees and will continue to do so. ICE is onsite daily and can address any issues, as presented or directed, to ensure the ICE protocols are in place and to report back any issues they may observe that need to be addressed.

See Zepeda Rivas, No. 3:20-cv-02731, Dkt. 37-1 ¶ 14. These sworn statements, made under oath in the Northern District of California, undermine the credibility of the declarations on which Defendant relies, and the argument it makes in this Court. Additional discovery is necessary to determine whether Plaintiff is correct that the United States exercised the requisite control for liability to attach. At this stage, the complaint as pleaded should allow this matter to proceed to discovery.

Defendant's fourth argument—that it was not legally responsible for protecting Mr. Ahn from COVID-19—fails for the same reason: it has not persuasively demonstrated that it entirely delegated that task to GEO Group. ICE's contract with GEO Group includes mandatory "Health Design Standards," a

"Screening ICE Detainees Health Form," a "IHSC electronic Quality Medical Care (QMC) Incident Report," a "IHSC electronic Quality Medical Care (QMC) Audit Tool," "IHSC Sample Clinical Practice Guidelines," "IHSC Minimum Staffing Requirements," a "IHSC Intake Screening Form," a "IHSC National Formulary" for medications, and a "IHSC Form 067 Request for approval of non-formulary medications," among other things. Mot. Dismiss, Ex. 3 at 9. It cannot be the case, as a matter of law, that ICE had entirely delegated "how to provide the detainees all necessary medical care" as Defendant argues. And again, its argument to this Court that it relinquished all responsibility for protecting Mr. Ahn is inconsistent with previous sworn testimony that the agency provided to other courts that it was working diligently to prevent the spread of COVID at Mesa Verde.

c. ICE's duties to Mr. Ahn were nondelegable.

Finally, ICE's duties to Mr. Ahn were nondelegable. Defendant argues that ICE's contract "expressly and entirely delegated" its responsibility to care for Mr. Ahn's health and safety to GEO Group, and was allowed to do so because ICE was not the landowner of Mesa Verde. *See* Mot. Dismiss 11–12. But Defendant's argument relies on a misreading of the relevant case law. Correctly read, Ninth Circuit and California state law dictates that ICE's duties to Mr. Ahn were nondelegable because the agency was his jailer.

The primary case on this issue is *Edison v. United States*, 822 F.3d 510 (9th Cir. 2016). Plaintiffs in that case were federal prisoners who sued the United States under the FTCA, alleging that the federal Bureau of Prisons ("BOP") breached its duty to protect them for harm by allowing a dangerous, infectious disease to spread at the facility. *Id*. at 513–14. Despite the fact that the prison was operated by an independent contractor, the *Edison* Court held that the independent contractor exception did not bar plaintiffs' claims against the federal government, because the BOP owed plaintiffs a duty of care that was nondelegable under California law. *Id*.

at 523. Specifically, the *Edison* Court held that California law established two bases that "gave rise to a duty to protect . . . prisoners from harm" that was nondelegable: (1) the agency's status as a landowner and (2) its status as a jailer. *Id.*

Contra to Defendant's reading of *Edison* in its motion to dismiss, these bases are independent from each other. The *Edison* Court's discussion of the duty of care owed by landowners was separate from its discussion of the rationale for the duty owed by jailers. *Compare id.* at 519 (describing the duties of landowners in general), *with id* 521–22 (describing the basis for the government's duty to protect prisoners). Regarding the second basis, the court explained that California law recognized "a special relationship between jailers and prisoners," and that state law "state imposes a heightened duty of care on jailers, due to prisoners' increased vulnerability while incarcerated." *Id.* at 521. In sum, status as a jailer was a separate and sufficient basis on which the independent contractor exception will not apply.

Lower courts have read *Edison* this way, holding that the independent contractor exception does not apply to claims that where the defendant agency was a jailer—even when that agency was not the landowner. *See, e.g.*, *Morales-Alfaro v. United States Dep't of Homeland Sec.*, No. 20CV82-LAB (BGS), 2021 WL 1061171, at *3 (S.D. Cal. Mar. 17, 2021); see also *Otay Mesa Detention Center*, CORECIVIC, https://www.corecivic.com/facilities/otay-mesa-detention-center (last visited July 13, 2023) (describing the detention center at issue in *Morales-Alfaro* as "[o]wned [by CoreCivic] since 2015"). And courts should, because this reading of *Edison* is grounded in principles of California state law, which dictate that duties are nondelegable where they involve a "peculiar risk." *See Toland v. Sunland Hous. Grp., Inc.*, 955 P.2d 504, 510 (1998) (noting that the doctrine of "peculiar risk is sometimes described as 'a nondelegable duty' rule"). "Under the doctrine of peculiar risk, a person who hires an independent contractor to do inherently dangerous work can be held liable for tort damages when the contractor causes injury to others by

negligently performing the work." *Id.* at 506. Acting as a jailer is conduct which involves a peculiar risk—as Mr. Ahn's experience at Mesa Verde underscores—and so, under California law, those duties are and should be nondelegable.

The facts here support the application of *Edison* to Plaintiff's claim. ICE was indisputably Mr. Ahn's jailer: the agency took him into custody immediately upon his release from CSP Solano, and held him at Mesa Verde for months until his death. The agency's status as a jailer is an independent and sufficient reason for which the independent contractor exception does not apply.

Defendant's arguments to the contrary fail. For one, Defendant argues that it did not owe Mr. Ahn a nondelegable duty because it was not the landowner of Mesa Verde. *See* Mot. Dismiss at 12. Plaintiff does not contest this fact in her opposition. But, as explained *supra*, the agency's status of a jailer is an independent and sufficient reason for which a duty can be nondelegable.

Second, Defendant argues that *Yanez v. United States* precludes Plaintiff's argument. Mot. Dismiss at 13. However, the plaintiff in *Yanez* was an injured *employee* of an independent contractor seeking relief under the FTCA, and in holding that the government owed that plaintiff no nondelegable duties, the *Yanez* Court relied on a California Supreme Court decision limited to the employee context. 63 F.3d 870, 871 and 873 (9th Cir. 1995). In that state decision, *Privette v. Superior Court*, the California Supreme Court held that "[w]hen, as here, the injuries resulting from an independent contractor's performance of inherently dangerous work are to an *employee* of the contractor . . . the doctrine of peculiar risk affords no basis for the employee to seek recovery of tort damages from the person who hired the contractor . . . ." 854 P.2d 721, 731 (1993) (emphasis added); *see also Toland*, 955 P.2d at 506 ("In *Privette* . . . we unanimously held that under the peculiar risk doctrine the hiring person's liability does not extend to the hired contractor's *employees*") (emphasis added). *Privette*'s holding was based on specific policy

rationales that only apply to employees: that is, that workers' compensation is an alternative remedial structure available to employees of independent contractors that makes liability for hirers under the doctrine of peculiar risk unnecessary. *Id.* at 723; And *Yanez*, by citing to *Privette*, incorporated this narrow exception into Ninth Circuit caselaw about FTCA liability. As Mr. Ahn, of course, was not GEO Group's employee, *Yanez* does not apply here.

In sum, Defendant has not met its burden of showing that its duties to Mr. Ahn were delegable, and this Court should hold that the independent contractor exception does not apply.

3. The discretionary function exception to the FTCA does not apply.

Defendant next argues that this Court does not have jurisdiction over Plaintiff's claims because the alleged conduct is discretionary, and so falls into the discretionary function exception to the FTCA's waiver of sovereign immunity. *See* Mot. Dismiss at 14.

The discretionary function exception bars claims against the United States that are "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); *see also Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000). This exception applies only where the specific government conduct being challenged (1) involves "an element of judgment or choice"; and (2) "implements social, economic, or policy considerations." *Nurse*, 226 F.3d at 1001 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). As with all exceptions to the FTCA, the government bears the burden of proving that the discretionary function exception applies. *Sigman v. United States*, 217 F.3d 785, 793 (9th Cir. 2000) ("The United States has the burden of proving that the discretionary function exception applies.").

Here, Defendant has not met this burden, and the exception does not apply, for three independent reasons: ICE has no discretion to violate the Constitution; none of ICE's conduct involved an "element of judgment or choice"; and none of ICE's conduct is based on policy considerations.

a. ICE's conduct violated the Constitution.

First, a majority of federal appellate courts, including the Ninth Circuit, have held that the discretionary function exception does not shield government conduct that violates the Constitution. *Nurse*, 226 F.3d at 1002 n.2 ("[T]he Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply."); *see also Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254–55 (1st Cir. 2003) (collecting cases). As the Third Circuit explained, "conduct cannot be discretionary if it violates the Constitution," because "Federal officials do not possess discretion to violate constitutional rights . . . ." *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988). Courts in this circuit have routinely held that "the mere pleading of a plausible constitutional violation" makes "the discretionary function exception inapplicable." *Fuentes-Ortega v. United States*, No. CV-22-00449-PHX-DGC, 2022 WL 16924223, at *2-3 (D. Ariz. Nov. 14, 2022) (collecting cases). Here, Plaintiff has stated a plausible constitutional violation, and for that reason alone, this Court should find that the discretionary function exception does not apply.

Immigrant detainees like Mr. Ahn are protected by the Fifth Amendment's due process clause, which imposes on the government an affirmative obligation to provide for their basic needs and safety while they are in custody. *See, e.g.*, *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012); *Castillo v. Barr*, 449 F. Supp. 3d 915, 919-920 (C.D. Cal. 2020) ("When the Government detains a person for the violation of an immigration law, the person is a civil detainee, even if he has a prior criminal conviction."). The government violates this obligation when it

demonstrates "objective deliberate indifference" to serious risks to a detainee's safety and well-being. *Gordon v. Cnty. Of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018). The "objective deliberate indifference" standard has four parts:

> (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
> (2) Those conditions put the plaintiff at substantial risk of suffering serious harm;
> (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and
> (4) By not taking such measures, the defendant caused the plaintiff's injuries.

Castro v. Cty. of Los Angeles, 833 F.3d at 1060 (9th Cir. 2016)

Plaintiff's complaint alleges all four elements. First, ICE made multiple intentional decisions with respect to Mr. Ahn's conditions of confinement. Among other things: ICE chose GEO Group as its contractor to operate Mesa Verde; ICE allowed GEO Group to provide inadequate medical and mental health care services and follow lax suicide prevention protocols at Mesa Verde; ICE failed to implement basic pandemic-related protections for detainees, including its own PRR, which required reducing population density; ICE opposed Mr. Ahn's petition for habeas relief by marshalling testimony, now determined to be false; and at Mr. Ahn's most vulnerable moment, ICE allowed Mr. Ahn to remain in isolation after his lawyers notified the agency of his depressive disorder and need to be transferred to a dormitory. *See* SAC ¶¶ 18, 21–24, 33–34, 52, 58; *see also Ahn v. Barr*, No. 20-CV-02604 (Apr. 20, 2021), Dkt. 15-2 ¶¶ 10–11. These actions constitute intentional decisions with respect to Mr. Ahn's conditions of confinement. *See, e.g., Pimentel-Estrada v. Barr*, 458 F. Supp. 3d 1226, 1244 (W.D. Wash. 2020) (holding that failure to enforce the PRR is an intentional decision).

Second, those conditions placed Mr. Ahn at substantial risk of harm. Mr. Ahn, who was 74 years old and had multiple comorbidities was at significant risk of serious illness or death if he contracted COVID-19. He was at even greater risk because his history of mental illness and multiple suicide attempts meant that he required extensive and careful treatment and monitoring—which GEO Group was unable to provide. *See, e.g.*, *id.* ¶¶ 14, 27. Isolating Mr. Ahn in these circumstances created an extraordinary risk to his safety and well-being. *Id.* ¶¶ 50–51. These risks were patently obvious. Risk factors for COVID-19 were well-known at the time, and so was the fact that congregate settings exposed him to a higher risk of infection (what some courts called the "tinderbox" effect). *See, e.g.*, *id.*; *Zepeda Rivas*, 465 F. Supp. 3d at 1030. Mr. Ahn's risk of self-harm or suicide was also obvious because he had been diagnosed with depression and had a history of suicidality. The detrimental effects of isolation on mental health, including the risk of death, were also well-known. *Id.* ¶¶ 50–51.

Third, ICE failed to take reasonable measures to abate those risks. Among other things that ICE could have done, but did not, were: conduct thorough inspections of GEO Group's operations at Mesa Verde, particularly with regard to its provision of medical and mental health care and compliance with suicide prevention protocols; implement its own PRR at Mesa Verde, including stopping the transfer of detainees in order to reduce capacity at the facility during the pandemic; releasing Mr. Ahn from detention, or transferring him to a safer ICE detention facility; and requiring GEO Group to remove Mr. Ahn from isolation when his lawyers contacted the agency on May 17. *See, e.g.*, *id.* ¶¶ 34, 58.

As a result of these failures, Mr. Ahn's mental health deteriorated, he was not provided with adequate treatment, was instead locked in an isolation cell with a tie-off point, and, while left there unmonitored, died by suicide. *Id.* ¶¶ 60–61.

These allegations state a plausible Fifth Amendment violation. Indeed, courts have found that the conditions at Mesa Verde during this period were unconstitutional *in general*—as well as for a detainee with as many compounding risk factors as Mr. Ahn. *Bent v. Barr*, 445 F. Supp. 3d 408, 417–18 (N.D. Cal. 2020) (finding that practices at Mesa Verde "are inadequate to ensure the 'safety and general wellbeing' of Mesa Verde detainees during the COVID-19 pandemic"); *see also Bahena Ortuño v. Jennings*, No. 20-cv-02064-MMC, 2020 WL 1701724 (N.D. Cal. Apr. 8, 2020), Dkt. 38 at 6–7.

Defendant's counterarguments are unpersuasive. First, Defendant argues that its actions—including selecting a contractor, supervising a contractor, or failing to enact policies (such as pandemic safety policies)—are all examples of the kind of conduct that falls within the discretionary function exception. *See* Mot. Dismiss at 17–18, 21. Even if that principle is true generally, it does not apply when the alleged conduct violates constitutional rights.[5] Second, Defendant argues that it cannot be liable because ICE had no authority to release Mr. Ahn. Mot. Dismiss at 15. Plaintiff contests this point, as discussed *supra*. But even if it were true, release was not the only action that the ICE could have taken. For example, ICE could have reduced the density at Mesa Verde to make the facility safer, or transferred Mr. Ahn to a safer

[5] None of the cases that Defendant cites in support of this argument consider whether the government's negligent conduct was also unconstitutional. *See Bibeau v. Pac. Nw. Rsch. Found., Inc.*, 339 F.3d 942 (9th Cir. 2003); *Layton v. United States*, 984 F.2d 1496 (8th Cir. 1993); *Guile v. United States*, 422 F.3d 221 (5th Cir. 2005); *Wood v. United States*, 290 F.3d 29, 37-38 (1st Cir. 2002); *Williams v. United States*, 50 F.3d 299 (4th Cir. 1995); *Gowdy v. United States*, 412 F.2d 525 (6th Cir. 1969). In fact, in one case that Defendant cites, *Myers & Myers, Inc. v. U.S. Postal Serv.*, the Second Circuit remanded the matter to the district court to consider whether, *inter alia*, the federal agency had "act[ed] in disregard . . . of the Constitution." 527 F.2d 1252, 1261 (2d Cir. 1975).

facility, or ordered that Mr. Ahn be placed in a different housing assignment once the agency was contacted by Mr. Ahn's lawyers. ICE's failure to take those reasonable measures, or any others, to abate the risk to Mr. Ahn establishes a constitutional violation.

In sum, Plaintiff has alleged a constitutional violation, and for this reason alone, the discretionary function exception does not apply.

b. ICE's actions did not involve an "element of judgment or choice."

Even if ICE's conduct was constitutional, none of the agency's actions involved "an element of judgment or choice" and so does not fall within the discretionary function exception.

"[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz*, 486 U.S. at 536. Acts governed by mandatory directives, by definition, do not involve choice, and so conduct that violates those directives does not fall into the discretionary function exception. *Id.*

Here, two mandatory policies governed to the conduct at issue in this case: the PRR and the PBNDS. The PRR, issued by ICE on April 10, 2020, are mandatory requirements that apply to all facilities holding ICE detainees. *See* Ex. 3, PRR at 4 (stating that the policy "sets forth *specific mandatory requirements* to be adopted by all detention facilities") (emphasis added). The PRR required ICE to, *inter alia*, identify all detainees who were at risk for severe illness from COVID-19, including those detainees who were over 65, had diabetes or heart conditions, or suffered from mental health conditions including depression. *Id.* at 10. Detention facilities were also required to monitor their risk status according to particular metrics, and, if they reached level "red," mandated "population reduction strategies to reduce detainee population to appropriate levels for physical distancing." *Id.* at 18. In addition, the PRR incorporated the *Interim Guidance on Prevention and Management of*

Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities ("CDC Interim Guidance"), and made compliance with that guidance mandatory. *Id.* at 9. The CDC guidance at the time stipulated that, among other things, detention facilities should limit transfers of new detainees, screen detainees for COVID-19 exposure or symptoms, and implement social distancing. *See* Ex. 4, CDC Interim Guidance at 9–11. ICE—not only GEO Group—is responsible for ensuring that the PRR are implemented. ICE has previously represented in federal court that it has both the responsibility and authority to ensure that the PRR are followed. *See, e.g.*, *Zepeda Rivas v. Jennings*, No. 3:20-cv-02731, Dkt. 264-1, Decl. Alexander Pham ¶ 5 ("ERO is responsible for observing, identifying, and notifying GEO of any perceived deficiencies in its adherence . . . mandated requirements, such as those associated with COVID-19 protections, in its management and operation of Mesa Verde."); *see also id.*, Dkt. 31-1, Decl. Erik Bonnar ¶ 14–15.[6]

But prior to Mr. Ahn's suicide, ICE violated, and allowed GEO Group to violate, many of the PRR. A federal district court found that, at the end of April 2020, Mesa Verde was still not implementing social distancing, still not testing detainees to determine COVID infection, and had "not even made the effort to determine which of its detainees suffer from medical conditions that put them in particularly severe danger from the virus." *Zepeda Rivas*, 465 F. Supp. 3d at 1030.

The PBNDS also govern ICE's conduct at Mesa Verde. PBNDS are an internal policy that ICE is required to follow, and to ensure are followed, at Mesa

[6] "Given the ICE [pandemic-related] protocols, MVDF staff and ICE officers are taking appropriate measures to ensure the health and safety of detainees and will continue to do so. ICE is on-site daily and can address any issues, as presented or directed, to ensure the ICE protocols are in place and to report back any issues they may observe that need to be addressed. ICE will continue to . . . adjust custody conditions when appropriate, to protect health, safety and well-being of its detainees." *Id.*

Verde. *See* Ex. 2, PBNDS at i ("Because ICE exercises significant authority when it detains people, ICE *must* do so . . . with a focus on providing sound conditions and care") (emphasis added). The PBNDS prescribe detailed courses of action in immigration detention facilities, including requirements for medical and mental health care, and suicide prevention. For this reason, courts have found that the discretionary function exception does not apply where plaintiffs have alleged violations of directives in the PBNDS. *Prado v. Perez*, 451 F. Supp. 3d 306, 313 (S.D.N.Y. 2020); *Baires v. United States*, 2011 WL 6140998, at *8 (N.D. Cal. Dec. 9, 2011). And again, ICE has previously represented in federal court that it has the responsibility and authority to ensure that its detention facilities comply with the PBNDS. *See, e.g.*, *Zepeda Rivas*, No. 3:20-cv-02731, Dkt. 264-1, Decl. Alexander Pham ¶ 5; *id*., Dkt. 37-2, Decl. Jennifer Moon ¶ 3 (stating that the ICE Health Services Corps "ensure[s] that the provision of medical care by contractors to the ICE detainees…meets detention standards").

Here, Plaintiff has alleged multiple violations the PBNDS in her complaint. For one, the PBNDS require ICE and GEO Group to identify detainees with a risk of suicide or self-harm at an initial screening, including by reviewing "relevant available documentation as to whether the detainee has been a suicide risk in the past, including during any periods of detention or incarceration." *See* Ex. 2, PBNDS at 333; SAC. ¶ 69. Staff must remain "vigilant" after the screening to identify detainees at risk of self-harm. Ex. 2, PBNDS at 333; SAC ¶ 70. A detainee who is identified as at-risk for suicide must be placed in a suicide-resistant room with one-to-one visual observation. Ex. 2, PBNDS at 334; SAC ¶¶ 72–74. Within 24 hours, a qualified mental health professional must examine the detainee to determine the level of risk, create a treatment plan, and evaluate the need to transfer the detainee out of the detention and to an inpatient mental health facility. Ex. 2, PBNDS at 333–337; SAC ¶ 73.

ICE failed to take any of these actions. At screening, Mr. Ahn was not identified as at-risk for suicide, despite the fact that he had previously attempted suicide three times while in custody in the California Department of Corrections. SAC ¶¶ 26. And he was not identified as at-risk afterwards, despite telling GEO Group staff at the end of April 2020 that he had a history of suicide, and also that he did not "want to live in this life." *Id.* ¶¶ 37–38, 48–49. Even after Mr. Ahn was identified as at risk for suicide, ICE did not follow protocols. On May 16, 2020, and then again on May 17, 2020, medical providers identified Mr. Ahn, who was then in an isolation cell, as a high risk for suicide if deported. *Id.* ¶¶ 57, 59. On the morning of May 17, Mr. Ahn's lawyers emailed ICE directly to inform them that Mr. Ahn needed to be transferred to the dormitory because isolation was damaging his mental health. *Id.* ¶ 58. And yet Mr. Ahn was not placed in a "suicide resistant" room, was not provided "continuous one-to-one monitoring," and was not "transferred to a psychiatric facility." Ex. 2, PBNDS at 334, 336. Instead, he was left unobserved in an isolation cell with a tie-off point for at least 18 minutes, during which time he died by suicide.

The PBNDS also have requirements for accommodating disabilities. The PBNDS require that staff "identify detainees with impairments that are open, obvious, and apparent." *Id*. at 348. When a detainee with a "potential disability" is identified, the facility must review the detainee for "necessary accommodations," and provide those accommodations "in an expeditious manner." *Id.* at 348–49. "[P]roper medication and medical treatment," and "appropriate housing," are examples of reasonable accommodations. *Id.* 347–48.

Depression is a disability. *Id.* at 346; *see also* SAC ¶ 78. And for Mr. Ahn, that depression—which was had been diagnosed by multiple medical professionals and which Mr. Ahn's lawyers reported directly to ICE—was "open, obvious, and apparent." SAC ¶¶ 14, 36, 48, 58–59. "Expeditious" and "reasonable"

accommodations in Mr. Ahn's case would have included, for example, prompt and "proper . . . medical treatment," like therapy, or immediate transfer to "appropriate housing," like the dormitory at Mesa Verde instead of the isolation room. Mr. Ahn was provided with no accommodations, and as a result, he died. In sum, ICE's conduct violated its own binding, internal policy, and so is not an exercise of the agency's judgment or choice.

Defendant's arguments to the contrary are unpersuasive. First, Defendant argues that Plaintiff cannot challenge its PRR as inadequate, because promulgating policies and rules falls within the discretionary function exception. *See* Mot. Dismiss at 22.[7] This argument misunderstands the issue. Plaintiff here does not argue that ICE failed to establish adequate policies; she argues that ICE failed to *abide by* the policies it established. Second, Defendant argues that ICE's failure to ensure that Mesa Verde "adopted and complied with" the PRR is a claim based on negligent supervision, which is a kind of claim that categorically falls into the discretionary function exception. *See* Mot. Dismiss at 23. This argument fails because there is no such categorical exception under Ninth Circuit law. *See Marlys Bear Med. V. U.S. ex rel. Sec'y of Dep't of Interior*, 241 F.3d 1208, 1217 (9th Cir. 2001) (holding that the discretionary exception did not apply, because that a federal agency "was required to ensure that [its independent contractor] complied with the contract provisions," and "was also required to routinely inspect [that contractor's] operations").

In sum, ICE's alleged conduct violated its own binding, internal policies, and so fails this prong of the discretionary exception test. "[T]he analysis ends there,"

[7] Defendant does not make the same argument about the PBNDS, which it does not raise in the context of its argument about discretionary functions.

Nanouk v. United States, 974 F.3d 941, 945 (9th Cir. 2020), and this Court should allow Plaintiff's claim to proceed.

c. ICE's conduct is not susceptible to policy analysis

Even if the PBNDS and PRR did leave ICE with an "element of judgment or choice" in how to implement them, that judgment would not be susceptible to policy analysis and so fails the second prong of the discretionary function exception test.

When evaluating the second prong of this test, courts must examine whether the judgment was the kind of discretionary function that the exception was designed to protect. *See Berkovitz*, 486 U.S at 536. "Decisions that require choice are exempt from suit under the FTCA only if they are 'susceptible to policy judgment' and involve an exercise of 'political, social, [or] economic judgment.'" *Cope v. Scott*, 45 F.3d 445, 448 (D.C. Cir. 1995) (citing *United States v. Gaubert*, 499 U.S. 315, 325 (1991)); *see also Nurse*, 226 F.3d at 1001. Importantly, and as a categorical matter, the implementation of "safety measures" is not susceptible to policy judgment, because "safety measures, once undertaken, cannot be shortchanged in the name of policy." *Marlys Bear Med.*, 241 F.3d at 1216–17. The Ninth Circuit explained that even if a federal agency did have discretion how it implemented safety measures, "its actions in carrying out its responsibilities" related to those safety measures "were not protected policy judgments and therefore fail to satisfy the second prong of the discretionary function analysis." *Id.*; *see also Whisnant v. United States*, 400 F.3d 1177, 1181–82 (9th Cir. 2005) (collecting cases).

Here, the conduct at issue relates to ICE's implementation of the PRR and PBNDS, which are safety measures designed to protect immigrant detainees. *See, e.g.*, Ex. 2, PBNDS at 331 (describing the suicide prevention standard as "protect[ing] the health and wellbeing of ICE detainees"); Ex. 3, PRR at 4 (describing the purpose of the PRR as "mitigating risk to the safety and wellbeing of detainees, staff, contractors, visitors, and stakeholders due to COVID-19"). Thus,

because these measures are safety protocols, ICE's decision to implement them (or not) was not based on policy considerations as a matter of law.

In sum, Defendant fails to establish that ICE's alleged conduct falls within either the discretionary function or independent contractor exceptions to the FTCA. This Court has jurisdiction over Plaintiff's claims, and her case should be allowed to proceed.

II. Plaintiff Has Stated a Claim for False Imprisonment.

Finally, Defendant argues that Plaintiff cannot state a claim for false imprisonment. Specifically, Defendant argues that a necessary element of false imprisonment claims is a lack of lawful privilege, and ICE had lawful privilege to detain Mr. Ahn, and indeed, was required to do so by statute. *See* Mot. Dismiss at 23.

This argument fails for the reasons discussed *supra*, which are briefly restated here. First, the Supreme Court has held that the federal government *always* has the discretion to not remove, and therefore to not detain pending removal. *See Thuraissigiam*, 140 S. Ct. at 1983 n.28. Second, and as an illustration of this legal point, ICE has long used its discretion to release from detention "[e]ven individuals required to be detained by statute," especially during the pandemic. *Fraihat*, 445 F. Supp. 3d at 726. And third, ICE does not have the authority to violate the Constitution in service of enforcing legislation, no matter the statutory basis for detention. *Cooper*, 358 U.S. at 18. Plaintiff has alleged that ICE held Mr. Ahn in unconstitutional conditions, and specifically in violation of his due process rights. ICE did not have the authority to do so. So, Plaintiff has alleged this element, and her claim of false imprisonment should be allowed to proceed.

CONCLUSION

In sum, Plaintiff has alleged that Defendant is liable under the FTCA for ICE's tortious conduct that caused her father's death. This Court has jurisdiction to hear those claims, and Defendant's motion to dismiss should be denied.

Dated: July 14, 2023

Respectfully submitted,

RIGHTS BEHIND BARS

By: /s/Oren Nimni
Oren Nimni **admitted pro hac vice*
Amaris Montes **admitted pro hac vice*
Sophie Angelis (SBN 341668)
416 Florida Avenue, NW #26152
Washington, D.C. 20001
(202) 540-0029
oren@rightsbehindbars.org
Attorneys for Plaintiff Sylvia Ahn

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2023, a true and accurate copy of the foregoing has been served on all counsel of record via this Court's CM/ECF electronic filing system.

/s/ Oren Nimni
Oren Nimni
RIGHTS BEHIND BARS
416 Florida Ave. NW #26152
Washington, D.C. 20001
Telephone: (202) 540-0029
oren@rightsbehindbars.org